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Letitia Bosman v Public Prosecutor (No 2)

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–76–04 OF 2017(J)
ROHANA YUSUF PCA, AZAHAR MOHAMED CJ (MALAYA), ABANG ISKANDAR CJ (SABAH AND SARAWAK), NALLINI PATHMANATHAN, VERNON ONG, ABDUL RAHMAN SEBLI, ZALEHA YUSOF, ZABARIAH MOHD AND HASNAH HASHIM FCJJ
C 13 AUGUST 2020

Criminal Procedure — Drug trafficking — Presumption of trafficking — Trial judge at end of defence's case failed to make finding whether or not accused had
D *rebutted statutory presumption of trafficking on balance of probabilities — Whether that failure vitiated accused's conviction — Whether the evidence was so overwhelming that accused had trafficked in the impugned drugs within the definition of s 2 of the Dangerous Drugs Act 1952 that there was no need to resort to the statutory presumption — Whether in the circumstances trial judge's*
E *aforesaid failure did not occasion a miscarriage of justice — Dangerous Drugs Act 1952 s 37(da)*

Customs officers on duty at the Senai International Airport arrested the appellant after their search of a bag she was carrying at the airport revealed two
F packets containing 1,920.2g of methamphetamine concealed within the left and right walls of the bag. The appellant was charged with trafficking in the drug contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The trial judge found that the appellant had custody, control and knowledge of the drugs, ruled that she had mens rea possession of it and invoked the
G presumption of trafficking against her under s 37(da) of the DDA. In her defence, the appellant said she came to Malaysia as part of a personal tour of Asia and that while she was shopping for a luggage bag in India, prior to coming to Malaysia, she befriended a Nigerian man ('George') who gave her a spare bag that he was not using. The appellant said she transferred all her
H belongings into the bag George had given her and discarded her old bag before flying to Malaysia. The appellant said she had no knowledge of the drugs in the bag and denied that she had invented 'George'. The trial judge held that George was a fiction as the appellant could not give any particulars about George to the investigating officer. The judge also found that the appellant's
I defence was highly improbable and failed to raise any reasonable doubt on the prosecution's case. Finding that the prosecution had proved its case beyond reasonable doubt, the trial judge convicted the appellant for trafficking and sentenced her to death. Both before the Court of Appeal ('COA') — which dismissed her appeal — as well as in the instant appeal against conviction and

sentence, the appellant contended that the trial judge had misdirected himself in the handling of the presumptions of possession and trafficking under s 37(d) and 37(da), respectively, of the DDA and that the judge had not appreciated her defence. The appellant argued that there was doubt whether the trial judge had invoked both the aforesaid presumptions against her, which he was not entitled to do in law. The judge had also failed to make a finding at the end of the defence's case as to which of the two presumptions had or had not been rebutted on balance of probabilities. The COA found that the trial judge had only invoked the presumption of trafficking after finding that the appellant had mens rea possession of the drugs. Although agreeing that the trial judge failed to make a specific finding on whether the appellant had rebutted the trafficking presumption (in accordance with the rule laid down in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169), the COA held that that could not be a ground to quash the conviction because the evidence overwhelmingly showed that even without the need to rely on the said presumption, the prosecution had made out a case of trafficking against the appellant under s 2 of the DDA premised on the evidence that she was carrying, keeping and transporting the drugs from India to Malaysia. In the circumstances, the trial judge's aforesaid failure did not cause any miscarriage of justice and her conviction was safe.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) **(per Zabariah Mohd FCJ, majority)** The appellant's contention that the trial judge had applied double presumptions or two presumptions in the alternative under ss 37(d) and 37(da) of the DDA without making a specific finding as to which presumption applied, had no merit. The grounds of judgment showed that the trial judge, after finding that the appellant had mens rea possession and knowledge of the drugs, invoked only the presumption of trafficking under s 37(da) against her (see paras 31, 33 & 35).

(2) **(per Zabariah Mohd FCJ, majority)** The COA did not err in holding that the appellant's conviction for trafficking was not vitiated by the trial judge's failure to make a specific finding as to whether the appellant had rebutted the presumption of trafficking under s 37(da) of the DDA on balance of probabilities and that no miscarriage of justice had been occasioned to her on account of that failure. Given the facts and evidence in this case, there was no necessity for the trial judge to have undertaken a separate exercise to consider whether on balance of probabilities the appellant had rebutted the presumption because the conclusion would have been the same, namely, that the appellant was trafficking within the definition of s 2 of the DDA based on the evidence that she was carrying, keeping and transporting the drugs from New Delhi to Johor Bahru (see paras 40–41 & 44).

(3) **(per Zabariah Mohd FCJ, majority)** The appeal had no merit as the prosecution's evidence against the appellant was overwhelming, the findings of the trial judge accorded with the weight of evidence adduced, the findings of the courts below did not warrant appellate intervention and the conviction was safe (see para 45).

[Bahasa Malaysia summary

Pegawai kastam yang bertugas di Lapangan Terbang Antarabangsa Senai menahan perayu setelah pemeriksaan beg yang dibawanya di lapangan terbang menjumpakan dua bungkusan berisi 1,920.2g metamfetamin yang disembunyikan di bahagian kiri dan kanan beg. Perayu telah dituduh mengedar dadah yang bertentangan dengan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Hakim perbicaraan mendapati bahawa perayu mempunyai penjagaan, kawalan dan pengetahuan terhadap dadah tersebut, memutuskan bahawa beliau mempunyai mens rea pemilikan terhadapnya dan mengguna pakai anggapan pengedaran terhadap beliau di bawah s 37(da) ADB. Dalam pembelaannya, perayu menyatakan bahawa beliau datang ke Malaysia sebagai sebahagian daripada lawatan peribadi ke Asia dan bahawa ketika beliau sedang membeli beg bagasi di India, sebelum datang ke Malaysia, beliau berkawan dengan seorang lelaki Nigeria ('George') yang memberikannya beg yang tidak gunakan oleh beliau. Perayu mengatakan bahawa beliau telah memindahkan semua barangnya ke dalam beg yang diberikan George dan membuang beg lamanya sebelum terbang ke Malaysia. Perayu mengatakan bahawa beliau tidak mempunyai pengetahuan mengenai dadah di dalam beg tersebut dan menafikan bahawa dia telah mencipta 'George'. Hakim perbicaraan berpendapat bahawa George adalah fiksyen kerana perayu tidak dapat memberikan perincian mengenai George kepada pegawai penyiasat. Hakim juga mendapati bahawa pembelaan perayu sangat mustahil dan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan. Setelah mendapati bahawa pihak pendakwaan telah membuktikan kesnya tanpa keraguan yang munasabah, hakim perbicaraan telah mensabitkan perayu terhadap pengedaran dadah dan menjatuhkan hukuman mati kepadanya. Kedua-duanya di hadapan Mahkamah Rayuan ('MR') — yang menolak rayuannya — serta dalam rayuan semasa terhadap sabitan dan hukuman, perayu menghujahkan bahawa hakim perbicaraan telah salah arah dalam mengguna pakai anggapan pemilikan dan pengedaran di bawah s 37(d) dan 37(da), masing-masing, di bawah ADB dan bahawa hakim tidak mengambil kira pembelaannya. Perayu berpendapat bahawa terdapat keraguan sama ada hakim perbicaraan telah menggunakan kedua-dua anggapan terhadapnya, yang mana tidak boleh digunakan oleh beliau berdasarkan undang-undang. Hakim juga terkhilaf membuat dapatan di akhir kes pembelaan mengenai kedua-dua anggapan yang telah atau tidak disangkal berdasarkan imbangan kebarangkalian. MR mendapati bahawa hakim perbicaraan hanya menggunakan anggapan pengedaran dadah setelah mendapati bahawa perayu mempunyai mens rea pemilikan dadah. Walaupun

bersetuju bahawa hakim perbicaraan gagal membuat dapatan khusus mengenai sama ada perayu menyangkal anggapan pengedaran (berdasarkan peraturan yang ditetapkan dalam *Mohamad Radhi bin Yaakob v Pendakwa Raya* [1991] 3 MLJ 169), MR memutuskan bahawa ianya tidak dapat dijadikan alasan untuk menolak sabitan tersebut kerana bukti-bukti menunjukkan bahawa walaupun tanpa perlu bergantung pada anggapan tersebut, pihak pendakwaan telah membuktikan kes pengedaran dadah terhadap perayu di bawah s 2 ADB berdasarkan keterangan bahawa beliau membawa, menyimpan dan mengangkut dadah dari India ke Malaysia. Dalam keadaan tersebut, kegagalan hakim perbicaraan tidak menyebabkan ketidakadilan dan sabitan beliau dikekalkan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) **(oleh Zabariah Mohd HMP, majoriti)** Hujahan perayu bahawa hakim perbicaraan telah mengguna pakai anggapan berganda atau dua anggapan sebagai alternatif di bawah ss 37(d) dan 37(da) ADB tanpa membuat dapatan khusus mengenai anggapan mana yang harus diguna pakai, adalah tidak bermerit. Alasan penghakiman menunjukkan bahawa hakim perbicaraan, setelah mendapati bahawa perayu mempunyai mens rea pemilikan dan pengetahuan mengenai dadah tersebut, hanya mengguna pakai anggapan pengedaran di bawah s 37(da) terhadap beliau (lihat perenggan 31, 33 & 35).

(2) **(oleh Zabariah Mohd HMP, majoriti)** MR tidak terkhilaf dalam menyatakan bahawa sabitan perayu terhadap pengedaran tidak tergugat oleh kegagalan hakim perbicaraan untuk membuat dapatan khusus sama ada perayu telah meyangkal anggapan pengedaran di bawah s 37(da) ADB pada imbangan kebarangkalian dan tidak ada ketidakadilan yang berlaku kepadanya kerana kegagalan tersebut. Berdasarkan fakta dan keterangan dalam kes ini, tidak perlu bagi hakim perbicaraan untuk membuat tindakan yang berasingan untuk mempertimbangkan sama ada pada imbangan kebarangkalian bahawa perayu menyangkal anggapan tersebut kerana kesimpulannya akan sama, iaitu bahawa perayu mengedar dadah dalam definisi s 2 ADB berdasarkan bukti bahawa beliau membawa, menyimpan dan mengangkut dadah dari New Delhi ke Johor Bahru (lihat perenggan 40–41 & 44).

(3) **(oleh Zabariah Mohd HMP, majoriti)** Rayuan tidak mempunyai merit kerana bukti pendakwaan terhadap perayu sangat banyak, dapatan hakim perbicaraan bersesuaian dengan keterangan yang diberikan, dapatan mahkamah bawahan ini tidak membenarkan intervensi rayuan dan sabitan tersebut dikekalkan (lihat perenggan 45).]

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (distd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Lim Son Heng v PP [2014] 6 MLJ 109, CA (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, CA (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP [2014] 6 MLJ 408, CA (distd)
Subramaniam a/l Arumugam v PP [2000] 2 MLJ 193; [2000] 2 CLJ 1, FC (refd)
Teh Hock Leong v PP [2008] MLJU 284; [2008] 4 CLJ 764, CA (refd)
Toh Ah Loh and Mak Thim v Rex [1949] 1 MLJ 54 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 92(1)
Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(1)(a) First Schedule

Appeal from: Criminal Appeal No: J-05–44–02 of 2015 (Court of Appeal, Putrajaya)

Editorial Note: Please refer to *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 for the decision on the issue of the constitutionality of the death sentence.

Gopal Sri Ram (Hisyam Abdullah, Abdul Rashid Ismail, Yasmeen Soh Sha Nisse, Karluis Quek, Azreen Ahmad Rastom, Siti Nurani Md Zahidi and Mohd Nor Hafidzuddin Yusoff with him) (Rashid Zulkifli) for the appellant.
Nik Suhaimi Nik Sulaiman (Umar Saifuddin Jaafar, Mangaikarasi Krishnan, Faizah Salleh, Ku Hayati Ku Haron, Asmah Musa and Muhammad Azmi Mashud with him) (Attorney General's Chambers) for the respondent.

Zabariah Mohd FCJ (delivering majority judgment):

BACKGROUND

[1] This is the majority judgment of this court. The appellant was convicted for the offence of trafficking in dangerous drugs and sentenced to death by the High Court, which was subsequently affirmed by the Court of Appeal on the following charge:

> Bahawa kamu pada 12 September 2013, lebih kurang jam 11.10 malam di Unit

Khas Pemeriksaan Penumpang Lapangan Terbang Antarabangsa Senai, di dalam Daerah Kulaijaya, di dalam Negeri Johor Darul Takzim, telah didapati mengedar dadah berbahaya iaitu, Methamphetamine seberat 1,920.2 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The appellant appealed to the Federal Court, which is the appeal before us against the conviction and the death sentence imposed ('the conviction issue'). At the same time the appellant also raised the issue of the constitutionality of the imposition of the death sentence ('the constitutionality issue').

[3] This judgment deals with the conviction issue only. The constitutionality issue is being dealt with in a separate judgment by my learned brother and sister judges, Azahar Mohamed CJ (Malaya) and Nallini Pathmanathan FCJ.

THE PROSECUTION'S CASE

[4] The appellant arrived in Malaysia when she landed at Senai International Airport, Johor on 12 September 2013. At 11.10pm on the same date, Mardiana bt Kamaruddin ('PW5'), a customs officer was on duty manning the scanner machines at the airport. PW5 scanned the appellant's bag ('P13A'), and found suspicious images on the right and the left walls of the said bag.

[5] PW6, another customs officer who was also on duty then requested the appellant to open P13A. The appellant had difficulty in opening P13A using the combination lock. PW6 called her supervisor, PW7 for assistance.

[6] PW7 tried to open P13A using the combination numbers given by the appellant but was unsuccessful. With permission from the appellant, PW7 broke the combination lock using a screw driver and managed to open P13A. PW7 felt lumps on the sides of P13A. PW7 asked the appellant to remove the clothes from P13A. At that time, PW7 noticed that the appellant was sending text messages on her handphone. DNA profiling was subsequently done on the clothes and some of the items bore the DNA of the appellant.

[7] After P13A was finally emptied, it was rescanned by PW5. The scanner still showed suspicious images. PW5 informed Khairul Anuar bin Ishak ('PW8'), from the Narcotics Unit of the Customs Department. PW8 inspected P13A and felt a bulge on both the left and right walls of P13A. He tore one side of P13A and found a packet wrapped in aluminium foil glued to a piece of plywood. He found the same thing when he tore the other side of P13A. PW8 made small opening on the two aluminium foils and found that they contained

whitish substance of crystalline powder. He ordered one of the custom officers to conduct preliminary tests on the crystalline powder and found the substance in the packets to be methamphetamine.

[8] The items were seized and handed over to the investigating officer, PW9 who later sent the aluminium foils and its contents to the chemist ('PW1') for analysis. PW1 found that the substances in both of the foils contained a total of 1,920.2g of methamphetamine, a dangerous drug listed under the First Schedule to the Dangerous Drugs Act 1952 ('the DDA').

FINDINGS AT THE END OF THE PROSECUTION'S CASE

[9] The learned trial judge considered the following issues:

(a) whether the appellant was in possession of the impugned drugs;

(b) whether the impugned drugs were listed as dangerous drugs within the First Schedule of the DDA; and

(c) whether the appellant was trafficking in dangerous drugs.

[10] The learned trial judge considered the evidence of PW5, PW6, PW7 and PW8 and guided by the cases of *Toh Ah Loh and Mak Thim v Rex* [1949] 1 MLJ 54; *Leow Nghee Lim v Reg* [1956] 1 MLJ 28 and *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337, found that the appellant had custody and control and knowledge of the impugned drugs in P13A. On the issue of possession, guided by *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764 and *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129, the learned trial judge found that the appellant had mens rea possession of the drugs.

[11] On the issue of trafficking, the learned trial judge invoked the presumption under s 37(da) of the DDA to make a finding that the appellant was trafficking in 1,920.2g of methamphetamine.

[12] Hence, the learned trial judge found that the prosecution had proven a prima facie case and ordered for the appellant to enter her defence.

THE DEFENCE

[13] The appellant gave evidence on oath. The appellant is from South Africa and at that point in time was engaged to be married. She had travelled to Malaysia as part of her trip around Asia to look for a suitable honeymoon destination. Prior to her trip to Malaysia, she had travelled to Bangkok and then to New Delhi where she stayed for four days in each city. She then travelled to Chennai, from where she took a flight to Kuala Lumpur and then

proceeded to Johor Bahru where she landed at Senai Airport.

[14] When the appellant was in New Delhi, while she was shopping for a luggage bag, she met a Nigerian man, who she referred to as George. She informed George that she was looking for a new luggage bag. They had lunch together and George offered to give the appellant a luggage bag which he had extra lying at his house.

[15] On the day before the appellant left New Delhi, George called the appellant and arranged to meet her at her hotel. George then gave her P13A. The appellant transferred her clothes from her old bag to P13A which was given by George. After helping the appellant to get rid of her old bag, George left. P13A was the bag which the appellant had checked in to take the flight to Johor Bahru. The appellant said she was unaware of the drugs in P13A and was not suspicious.

[16] Having arrived at Senai International Airport late at night on 12 September 2012, after collecting P13A, the appellant placed it on the customs scanner. She was requested by the customs officer at the scanner to open her bag. She attempted to do so but P13A would not open. There was some problem with the combination lock. The appellant consented to the customs officer to prise open P13A with force.

[17] After the customs officers managed to open P13A, the appellant said that she was surprised to see the items in P13A as she said she did not know what was inside P13A. She then sent text messages to both her fiancée and to Monty to inform them what was happening as she was close to Monty, who had planned her trip.

[18] The appellant denied the suggestion by the prosecution that George was a fictitious character and an invention. The appellant asserted that she had told PW9 about George. She said she had told PW9 that George's number would appear in the call log on her handphone.

FINDINGS AT THE END OF THE DEFENCE CASE

[19] The thrust of the defence of the appellant was that she did not have knowledge of the impugned drugs that were found in P13A.

[20] The learned trial judge found that the character, George did not exist. The reason being that the appellant failed to give particulars of George to the investigating officer. The appellant could not remember George's phone number and neither did she save George's number under 'contact'. Based on the forensic report of the appellant's handphone (P35A) there were text

messages sent by the appellant to one Boshoff Jaco. This was at the time when the appellant's bag was searched by the customs officers.

[21] The cautioned statement of the appellant also failed to mention the name of George or Boshoff Jaco. Hence the learned trial judge held that the defence of the appellant was highly improbable and that George was a fictitious character concocted by the appellant.

[22] On the defence of innocent carrier, the learned trial judge held that the conduct and reaction of the appellant upon P13A being searched do not support the defence of innocent carrier. The learned trial judge found that the appellant failed to raise any reasonable doubt on the prosecution's case and that the prosecution succeeded in proving its case against the appellant beyond reasonable doubt. The appellant was convicted under s 39B(1)(a) of the DDA and sentenced to death according to the law.

FINDINGS BY THE COURT OF APPEAL

[23] Before the Court of Appeal, the appellant raised the following issues:

(i) the learned trial judge misdirected himself in the handling of the presumptions under s 37(d) and (da) of the DDA;

(ii) that the learned trial judge failed to appreciate the appellant's defence; and

(iii) the mandatory death sentence provided for under the DDA is unconstitutional.

[24] As the issues raised in the appeal before us relate only to the issues stated at paras (i) and (ii), this judgment will only be confined to issue (i) and (ii) only. The constitutional issue at paragraph (iii), as we have said earlier, will be dealt with in a separate judgment.

[25] The complaints by the appellant are that:

(a) the learned trial judge failed to make a finding at the end of the prosecution's case whether the learned trial judge applied double presumptions or two presumptions in the alternative under s 37(d) and 37(da) of the DDA; and

(b) at the end of the defence case, as to which presumption has or has not been rebutted on a balance of probabilities.

[26] Having perused the grounds of the learned trial judge, the Court of Appeal found that the learned trial judge had not misdirected himself in

handling the presumptions under the DDA. The Court of Appeal held that the learned trial judge made findings of mens rea possession and trafficking under s 37(da) of the Act.

[27] In so far as the finding at the close of the defence case, while the Court of Appeal accepted the defence counsel's submission that the learned trial judge failed to make specific finding on whether the appellant had rebutted the presumption of trafficking under s 37(da) of the Act, the panel of the Court of Appeal disagreed with learned counsel for the appellant that the conviction ought to be quashed on this ground. It was held by the Court of Appeal that the omission of the learned trial judge to make a finding on whether or not the presumption of trafficking has been rebutted by the appellant on a balance of probabilities, in the circumstances of the case, resulted in no miscarriage of justice to the appellant and did not vitiate the conviction.

[28] The Court of Appeal held that a case of trafficking has been made out by the prosecution under s 2 of the DDA premised on the evidence that the appellant was carrying, keeping and transporting the drugs from New Delhi to Johor. The Court of Appeal found that the conviction against the appellant is safe.

OUR FINDINGS

Whether the learned trial judge applied double presumptions or two presumptions in the alternative under s 37(d) and 37(da) of the DDA

[29] It is submitted by learned counsel for the appellant that the trial judge committed a serious misdirection when:

(a) he applied double presumptions (ie invoking presumption under s 37(d) and presumption under s 37(da) of the DDA); or

(b) two presumptions in the alternative (ie under s 37(d) or 37(da) of the DDA), without making an election as to which presumption is he relying on,

in his finding of a prima facie case against the appellant and in rejecting her defence at the defence stage.

[30] The effect of the learned trial judge applying both the presumptions in s 37(d) and 37(da) is unduly harsh and oppressive on the appellant. The application of double presumptions under s 37(d) to invoke the presumption under s 37(da) is prohibited (see *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273). Whereas the effect of invoking presumptions in the alternative without making an election as to which presumption the learned trial judge is relying on, amounts to a misdirection on the part of the trial judge

(see *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408).

[31] On perusal of the grounds of judgment of the learned trial judge, we found that the learned trial judge did not apply double presumptions in this case. Nowhere did the learned trial judge applied the presumption under s 37(d) to invoke the presumption under s 37(da) of the DDA.

[32] In this regard, we refer to pp 17–18 of the grounds of the learned trial judge where he said:

> ... the prosecution has proved that through the evidence of SP5 who was on duty at the Senai airport on the night of the incident and she scanned the trolley bag (P13A) saw suspicious images on the left and right sides of the wall of P13A ... The accused was seen shivering and was seen as if she was sending out sms to someone ...
>
> Based on the direct evidence of SP5, SP6, SP7 and SP8 and indeed the luggage tag ... on the trolley bag ... was in the name of the accused. The accused was seen pushing the trolley bag ... from the luggage carousel to the Special Passenger Inspection Unit and to the scanning machine. The court was also appraised of the fact that one of the items marked as 'B6' which was short pant and 'G7' long pant retrieved from the trolley bag ... has DNA profiling which was consistent with the blood specimen ... which came ... from the accused. From evaluating the evidence of the prosecution witnesses *there were overwhelming direct evidence to show that the accused had the mens rea possession of the drugs in the trolley bag. The accused had the knowledge of the nature of the drugs in the trolley bag and has ultimate power of disposal of the drugs she was carrying*. The question of whether the accused had the requisite knowledge of the drugs in the trolley bag, reference was made to the case of *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489 which states that *'Knowledge was to be inferred from the facts and the surrounding circumstances of the case'. The prosecution evidence showed that the drugs were concealed in the aluminium foil glued to the wall of trolley bag ... and was retrieved with some difficulty*. In *Teh Hock Leng v Public Prosecutor* [2008] 4 CLJ 764, the court held that the drugs were cunningly concealed may indicate the intention to avoid detection and thereby exhibit knowledge ...

At p 21 the learned judge further said the following:

> ... The court in the instant case and on the direct evidence that the accused had in his possession of 1,920.2g methamphetanine as listed under s 37(da)(xvi) of the Act which states that any person who is in possession of 50g or more in weight of methamphetamine, otherwise than in accordance with the authority of this Act, or any other written law shall be presumed, until the contrary is proved, is trafficking in the said drug. The court with the aid of the presumption under s 37(da)(xvi) of the Act held that the accused was trafficking ... methamphetamine otherwise in accordance with the authority of the Act, or any other written law shall be presumed, until the contrary is proved, is trafficking in the said drug. The court with the aid of the presumption under s 37(da)(xvi) of the Act held that the accused was trafficking in 1,920.2g of methamphetamine.

[33] From the grounds as reproduced in the preceding paragraph, the learned trial judge found that the appellant had mens rea possession and he inferred knowledge from the evidence of the way the drugs were concealed between the walls of the bag, P13A. Subsequently the learned trial judge made findings of trafficking under s 37(da) of the DDA. We agree with the Court of Appeal when it held that the learned trial Judge did not err when he found that the appellant had custody and control of the drugs and had made the correct inference on knowledge from the proven circumstances thereof.

[34] We also found that, it is also not a case similar to *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* where the learned trial judge therein adverted to both presumed possession under s 37(d) and presumed trafficking under (da) in addition to s 2, without making an election whether the appellant was found to be in actual possession and was presumed to be trafficking under s 37(da) or whether he was presumed to be in possession of the drugs under s 37(d) and was found to be trafficking under s 2 of the DDA. Hence the submission by the appellant's counsel that the facts in *Seyedalireza Seyedhedayatollah Ehteshamiardestani* is similar to our present case is without merits.

[35] Therefore, the issues raised by the appellant with regards to whether the learned trial judge applied double presumptions or two presumptions in the alternative under s 37(d) and 37(da) of the DDA without making a specific finding as to which presumption apply, has no merits.

Issue on the failure of the learned trial judge to make specific finding at the end of the defence case, as to which presumption has or has not been rebutted on a balance of probabilities

[36] As there was no double presumption being invoked, the issue as to which presumptions had been rebutted does not arise. There is only one presumption invoked by the learned trial judge in this case.

[37] The complaint by the appellant is that the learned trial judge merely considered that 'the contents of the cautioned statement was nothing more than a bare denial by the accused and has not helped the defence case in rebutting the presumption of trafficking in dangerous drugs', the learned trial judge failed to make specific finding or reference as to whether the presumption of trafficking had been rebutted by the defence case in the judgment.

[38] Counsel for the appellant submitted that the failure by the learned trial judge to separately consider whether, on a balance of probabilities the defence of the appellant had rebutted the presumption of trafficking under s 37(da) of

A the DDA, was fatal. However counsel for the appellant was not asking for an acquittal but merely asking for a reduction of the charge to one of possession.

[39] In support of this contention, counsel for the appellant referred to *Subramaniam a/l Arumugam v Public Prosecutor* [2000] 2 MLJ 193; [2000] 2 B CLJ 1 where the Federal Court had quashed the conviction for trafficking solely on the ground that the trial judge had failed to consider, as a separate exercise whether on the evidence the appellant had succeeded on a balance of probabilities in rebutting the statutory presumption of trafficking under s 37(da) of the Act. The conviction of trafficking in that case was substituted C with one of possession.

Counsel for the appellant further referred to *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 where the Federal Court held that such failure to make a finding whether the appellant had D rebutted the presumption under s 37(da) of the DDA amounts to a misdirection in law by way of non direction.

[40] The Court of Appeal agreed that there was a failure on the part of the E learned trial judge in making a specific finding as to whether the appellant had rebutted the presumption of trafficking under s 37(da) of the DDA on a balance of probabilities. Nevertheless, the Court of Appeal did not find such failure has occasioned a miscarriage of justice to the appellant which warrants vitiating the conviction imposed by the learned trial judge, as the Court of F Appeal found that there was indeed a case of trafficking established by the prosecution under s 2 of the DDA premised on the evidence that the appellant was carrying, keeping and transporting the drugs from New Delhi to Johor Bahru.

G **[41]** It is our view that the Court of Appeal had not erred in this respect. Counsel for the appellant premised his argument on the Federal Court cases of *Subramaniam Arumugam* and *Alcontara*. However we need to state that the facts of *Alcontara* are distinguishable from our present case. There, both the presumptions under s 37(d) and 37(da) of the DDA were invoked against the H appellants therein. This can be discerned from the *Alcontara*'s case where the Federal Court speaking through Edgar Joseph Jr FCJ said at p 219, para I (MLJ) that:

> ... Nowhere in his judgment did the judge direct attention to the statutory presumptions as to possession *(s 37(d)) and trafficking (s 37(da))*, and as a result, he I made no finding as to whether the defence had rebutted the same. In our view this was a misdirection in law by way of non-direction having regard to the following passage in the judgment of Azmi SCJ in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 at p 172 para 1:
>
> In our opinion unless the evidence in a particular case does not obviously so

warrant, it is incumbent for the court to consider whether on a balance of probabilities, the evidence of the defence has rebutted the statutory presumption of trafficking under s 37(da) as a separate exercise even though the court is satisfied on balance that the presumption of possession under s 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

Having said that, we would add there may well be cases where because of the absolutely overwhelming nature of the affirmative evidence led by the prosecution, there is no need for resort to be had to the statutory presumptions aforesaid, but even in such a case, we consider that the trial court should, specifically, so find.

[42] Similarly in *Subramaniam Arumugam*, it also dealt with both presumptions being invoked, hence the necessity of making specific findings whether both presumptions had been rebutted or whether only one presumption was rebutted. It cannot be presumed that if one presumption was rebutted, the other presumption become irrebuttable or rebutted. There, the learned trial judge only dealt with the statutory presumption under s 37(d) of the DDA without adverting to the presumption under s 37(da) of the DDA. In other words there was no consideration of whether the presumption under s 37(da) of the DDA had been rebutted or not. Hence the necessity of making specific finding on presumption under s 37(da) of the DDA. This can be seen from the judgment *Subramaniam Arumugam* at pp 198–199 (MLJ); p 6, para h (CLJ):

The third ground was the failure of the trial judge to follow *Mohamad Radhi bin Yaacob v Public Prosecutor* [1999] 3 MLJ 169 when he convicted the appellant for trafficking without addressing his mind on the question whether the defence had rebutted the statutory presumption of trafficking under s 37(da). Encik Karpal Singh referred us to the grounds of judgment of *the trial judge which he contended dealt only on the statutory presumption under s 37(d) without adverting to the presumption under s 37(da)*. On this point, Dato Mohd Zaki, TPR agreed that the trial judge based the conviction for trafficking on *the failure of the appellant to rebut the presumption of possession under s 37(d) without considering s 37(da).*

After considering the evidence and the conclusion of the learned trial judge, we found that His Lordship had misdirected himself in failing to adopt *Mohamad Radhi* in considering whether on a balance of probabilities the evidence of the defence had rebutted the statutory presumption under s 37(da) of the Act, although he found that the appellant had custody and control of the red plastic bag and therefore deemed to be in possession of the drug. Accordingly, we allowed the appeal on this ground, quashed the conviction, set aside the death sentence and substituted a conviction under s 6 ...

[43] In our present case, only one presumption was invoked, namely s 37(da) of the DDA. The learned trial judge did consider the defence of the appellant,

except that there was no specific finding whether such defence forwarded by the appellant had rebutted the presumption under s 37(da) of the DDA, which the learned trial judge had invoked.

[44] Based on the authorities cited, we are of the view that such failure on the part of the learned trial judge to direct himself on this issue (making specific finding whether the presumption has been rebutted) has not occasioned a substantial miscarriage of justice. There is no necessity for the learned trial judge to undertake a separate exercise to consider whether on a balance of probabilities, the appellant has rebutted the statutory presumption of trafficking under s 37(da) of the DDA, given the facts in this particular case. The learned trial judge had considered the facts and evidence, namely that appellant was lugging a bag which contained 1,920.2g of dangerous drugs which was glued and cunningly hidden between the left and right sides of P13A from New Delhi to Johor. When PW8, a narcotics enforcement officer at the airport inspected P13A, he said he could feel bulges on both the left and right walls of P13A. P13A bore a luggage tag in the name of the appellant. At the material time when the appellant was arrested, she alone was in possession of the bag which contained the dangerous drugs. It is improbable that 'George' would give a bag which contained 1,920.2g dangerous drugs for her to lug across from New Delhi to Johor without her knowledge. There was also the finding by the learned trial judge that 'George' was a fictitious character invented by the appellant. There was also no credible explanation as to what would happen to the drugs in P13A after she arrived in Johor. This shows the incredulity of the appellant's defence of no knowledge as to the presence of the dangerous drugs in P13A, and the strong inference is that the appellant had knowledge and that she was carrying, keeping and transporting the dangerous drugs for purposes of onward transmission to another person. The large amount of the dangerous drugs cannot possibly be for her personal consumption. In light of the foregoing, even if the learned trial judge did not make a specific finding in accordance to the rule as laid down in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169, the conclusion would have been the same, namely that the appellant was trafficking within the definition of s 2 of the DDA. The Court of Appeal did not err when it found that there was indeed a case of trafficking established by the prosecution under s 2 of the DDA premised on the evidence that the appellant was carrying, keeping and transporting the drugs from New Delhi to Johor Bahru. In this respect the Court of Appeal case of *Lim Son Heng v Public Prosecutor* [2014] 6 MLJ 109 is relevant which had addressed and considered on a similar issue. It was held in that case that:

> (1) ... The circumstances of the case did not obviously warrant the trial judge undertaking such a separate exercise. The appellant was not in passive possession of the drugs in question. Considering the quantity of the drugs, it was unlikely they were for his consumption and they were found in a drug-manufacturing setting. In the absence of contradiction or credible explanation, this fact was sufficient to lead

> to a strong inference that the appellant was eventually going to transfer possession of the drugs to another party. In view of the overwhelming evidence, even if the trial judge had undertaken a separate exercise of assessment in accordance with the rule in *Mohamad Radhi bin Yaakob v Public Prosecutor*, he would have come to the conclusion that the appellant had failed on balance of probabilities to rebut the s 37(da) presumption of trafficking ...

The appeal of the appellant to the Federal Court was dismissed and the conviction and sentence by the Court of Appeal was affirmed by the Federal Court vide Appeal No 05–182–08 of 2013.

[45] Given the aforesaid, there is no merit in the appeal by the appellant. The evidence presented by the prosecution against the appellant was overwhelming. The findings of the learned trial judge were in accordance to the weight of evidence adduced which was subsequently affirmed by the Court of Appeal. In the context of the present case, the failure of the learned trial judge to direct his mind whether the presumption under s 37(da) of the DDA has not occasioned a miscarriage of justice. The proviso to s 92(1) of the Courts of Judicature Act 1964 applies, which provides that:

> Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

In light of the circumstances, we do not find the findings of both courts warrant appellate intervention and we are satisfied that the conviction is safe.

[46] Accordingly, we dismiss the appeal and affirm the conviction and the death sentence imposed by the learned trial judge.

[47] My learned brother and sister judges in the panel (save and except for Nallini Pathmanathan FCJ) have read this judgment and have expressed their agreement to it, to form the majority judgment of this court.

Appeal dismissed; conviction and sentence affirmed.

Reported by Ashok Kumar